Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

October Term, 1994

NICHOLAS E. TAVAGLIONE,

Respondent,

v.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME 3 OF 3

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In the Court of Appeal of the State of California

FOURTH APPELLATE DISTRICT
DIVISION TWO

NICHOLAS E. TAVAGLIONE,

Plaintiff and Respondent,

v.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Defendants and Appellants.

PETITION FOR REHEARING

To the Honorable Justices of the Court of Appeal, Fourth Appellate District, Division Two:

Defendants and appellants, in accordance with rule 27, and in compliance with the requirements of rule 29(b)(2), of the *Rules of Court*, respectfully petition for rehearing of this

case. It is submitted that the matter should be reheard for the following reasons:

I.

By Deciding the Case on the Basis of a Supposed Oral or Implied Contract to Make a Loan, the Court of Appeal Has Violated Government Code Section 68081 and the Defendants' Constitutional Right to Notice.

In its opinion, the Court of Appeal has apparently recognized that the plaintiffs entire case depends upon the supposed duty of Riverside National Bank to make loans to the plaintiff. There is no such legal duty. The court has, however, attempted to supply one. It has ruled that the evidence was "sufficient to establish either an oral agreement or an agreement implied from Billing's conduct that defendants, at the very least, would not refuse unreasonably to renew or extend plaintiff's outstanding loans while plaintiff's cash flow problem persisted and so long as plaintiff was current on the interest payments." (Opinion, page 48.)

The record, however, contains no cause of action for any type of breach of contract, whether a supposed oral agreement or an implied contract. There is no allegation in the operative first amended complaint about the existence of any such contract. Moreover, any contract to make a loan on the part of a bank would violate federal law, which prohibits loans to borrowers who are not credit worthy. 12 *U.S.C.* 1818. The law does not permit an illegal contract to be implied. There is no evidence of an express contract, which would, in any event, violate the parole evidence rule and perhaps also banking regulations.

The issue of breach of contract has not been briefed by any party to this case. Therefore, this court has the legal

obligation to grant rehearing. *Government Code* section 68081 provides as follows:

> "Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

In *Adoption of Alexander S.*, 44 Cal.3d 857 (1988), the California Supreme Court recognized that the statute mandates compliance with its requirements, and that the reviewing courts have no discretion to act otherwise. The Supreme Court soundly chastised the Court of Appeal in that case for failing to heed the statutory command. 44 Cal.3d at 864-865.

Even if there is evidence that could support a breach of contract theory, which defendants deny, the present Court of Appeal opinion is improper. Rehearing is required, so that the issue may be briefed. Moreover, if the defendants are subject to liability for breach of contract, they had a constitutional right to notice of the claim.

A classic statement of the constitutional right to notice can be found in *Lambert v. People of the State of California,* 355 U.S. 225 (1957). In *Lambert,* the Supreme Court declared that:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to

> defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." 355 U.S. at 228.

The requirement of notice applies to both civil and criminal cases. 355 U.S. at 228.

To be constitutionally sufficient, adequate notice must be given of legal proceedings, which must be reasonably calculated to inform parties of those proceedings which may directly and adversely affect their legally protected interests. *Walker v. City of Hutchinson,* 352 U.S. 112, 115-116 (1956). See also, *Covey v. Town of Somers,* 351 U.S. 141 (1956).

In *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950), the Court overturned a state court decree settling accounts by the trustee of a common trust fund, on the ground that the notice given under state law was insufficient to satisfy the requirements of the Fourteenth Amendment. The Court observed that "[m]any controversies have raged about cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313. The notice in the *Mullane* case was insufficiently specific, because the beneficiaries of the trustee answer for negligent or illegal impairment of their interests. Furthermore, the beneficiaries were not notified about the fact that fees might be allowed that would diminish payments to them. 339 U.S. at 313.

In the operative first amended complaint, there is no allegation whatsoever of a contract to make a loan to the plaintiff. Prior to this court's decision of November 17, 1993, the theory of breach of contract had not even entered the litigation. If the defendants are liable for breach of a contract, they should have been given notice of this claim.

The civil equivalent of a criminal indictment is a complaint. Although the Supreme Court "has endorsed the modern relaxation of pleading rules, it has never receded from the requirement that civil complaints provide party's defendant with 'fair notice' of the claims against them." *New Motor Vehicle Board of the State of California v. Orrin W. Fox Company,* 439 U.S. 96, 125 (1978) (dissenting opinion of Justice John Paul Stevens, citing the unanimous opinion of the Court in *Conley v. Gibson,* 355 U.S. 41 (1957)).

Certainly, the defendants had the constitutional right to defend themselves against any claim of breach of contract. They could have presented evidence to show the invalidity of the theory. They were never given the opportunity to do so.

The Court of Appeal, perhaps reluctantly, has recognized the invalidity of the plaintiff's primary cause of action for "illegal ouster." In its place, the court has substituted a "breach of contract" theory, something that it has no legal authority to do. Rehearing must be granted, in order to comply with *Government Code* section 68081, and to avoid trampling on the defendants' constitutional rights.

II.

Because the Plaintiff's Basic Cause of Action for "Wrongful Ouster" Is Invalid, the Secondary Causes of Action, Such as Defamation and Breach of the Covenant of Good Faith and Fair Dealing, Are Also Invalid, Since They Cannot Stand Independently.

In its original opinion, the Court of Appeal misinterpreted and misapplied the general verdict rule. It does so again. The general verdict rule presupposes "separate and independent counts or causes of action" that are "independent in nature and isolated in content so as to preclude any interrelationship between them." *Henderson v. Harnischfeger*

Corporation, 12 Cal.3d 663, 674 (1974). Even this threshold requirement is not met in the present case.

The court has recognized (Opinion, page 18) that the main legal theory on which this case was tried, "illegal ouster," is invalid as a matter of law. However, the court fails to grasp the interrelationship between this invalid cause of action and the two causes of action which the court finds sufficient.

For a plaintiff to have the right to sue a defendant, "there must be a wrongful invasion by the defendant of some legal right of the plaintiff and damage resulting to the plaintiff from the wrongdoing." *Priola v. Paulino,* 72 Cal.App.3d 380, 387 (1977). Thus, the plaintiff must plead the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts constituting the defendant's wrongful conduct. *Lodi v. Lodi,* 173 Cal.App.3d 628, 631 (1985). The relationship between facts pleaded and legal theories relied upon presents recurrent conceptual problems. *Perry v. Robertson,* 201 Cal.App.3d 333, 339 (1988). The same course of conduct may represent both a breach of contract and a tort, while negligent performance of a contractual duty may give rise to a claim of breach of contract. 201 Cal.App.3d at 340. Where a hybrid cause of action arises, the plaintiff may pursue two or more legal theories of recover, unless they are inconsistent, requiring an election of remedies. 201 Cal.App.3d at 340. Nonetheless, under the "primary right" theory of pleading followed in California, a plaintiff's cause of action is based upon the injury suffered by the plaintiff, regardless of the particular legal theory or theories upon which the plaintiff seeks redress. *Friedberg v. Cox,* 197 Cal.App.3d 381, 388 (1987). It is the right sought to be established, not the remedy or relief, which governs the nature and substance of the cause of action. *R &*

A Vending Services, Inc. v. City of Los Angeles, 172 Cal.App.3d 1188, 1194 (1985).

As pleaded, the cause of action for breach of the implied covenant of good faith and fair dealing is based upon the plaintiff's former relationship with the Riverside National Bank, as a stockholder, a director, and a borrower. These three relationships are alleged to create a duty on the part of the bank and its officers and directors to permit the plaintiff to continue in office as a director. However, by recognizing the invalidity of the "illegal ouster" claim, the Court of Appeal has undermined all of the subsidiary claims. If there is nothing legally wrongful in ousting a deadbeat director, then no covenant of good faith and fair dealing arises with respect to the status of the plaintiff as a director. Similarly, the defamation claim rests upon the contention that the plaintiff was not, in fact, validly removed from the board of directors of the Riverside National Bank, contrary to what was reported in the press.

The Court of Appeal has failed to recognize that all of the causes of action pleaded flow from the plaintiff removal as a director of the Riverside National Bank. If the removal was not legally wrongful or actionable, then the remaining causes of action are invalid. Moreover, even if the secondary claims were independent in some sense, they were certainly tainted by the lengthy trial on "illegal ouster."

III.

Having Found Fundamental Instructional Error With Respect to the "Wrongful Ouster" Claim, the Court of Appeal Had the Duty to Review the Entire Record to Determine the Effect of Such Error, But Has Failed to Do So.

In recognizing the legal invalidity of the "illegal ouster" cause of action, the Court of Appeal has implicitly found that the jury instructions on this cause of action should not have been given. However, the court fails to do what is required when instructional error is found, which is to determine the effect of the error after an examination of the entire record. Had the entire record in this case been examined, rather than just the first amended complaint, the court would have concluded that the instructional error with respect to the "illegal ouster" cause of action severely prejudiced the defendants. After all, nearly all of the trial was devoted to the cause of action which has been found not to have ever existed.

Rather than undertake the analysis required when instructional error has been identified, the Court of Appeal persists in misinterpreting and misapplying the general verdict rule, which is inapplicable where there is instructional error. The classic formulation of this rule can be found in this court's decision in *Henderson v. Harnischfeger Corporation,* 12 Cal.3d 663 (1974). The rule is that "a general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense." 12 Cal.3d at 673. A corollary of this rule is that, where there are several different counts or causes of action, a general verdict will stand if the evidence supports it on anyone sufficient count. 12 Cal.3d at 673.

Although the general verdict rule still stands, it has been largely swallowed up by exceptions, one of which was

found applicable in the *Henderson* case itself. In particular, after citing the general verdict rule and its corollary, this court in *Henderson* stated that "the giving of an improper instruction presents a different situation" from one where the general verdict rule would otherwise be applicable. 12 Cal.3d at 673. Where instruction error is involved, the question is whether, in the absence of such error, the jury might have rendered a verdict in favor of the losing party. 12 Cal.3d at 674.

In explaining the inapplicability of the general verdict rule, and its corollary, to instructional error, this court in *Henderson* reasoned as follows:

> "We are not dealing with separate and independent counts or causes of action and the sufficiency of evidence on any one of them. Nor are we dealing even with separate issues, so independent in nature and isolated in content as to preclude any interrelationship between them. As we have shown, the two issues of strict liability on the one hand and assumption of risk on the other are inherently conjoined by the facts of the accident. . . . The formula which defendant's argument suggests is not applicable and certainly will not permit us to shortcut our constitutional duty to examine the entire record so as to determine the effect of the challenged instruction." 12 Cal.3d at 674.

As noted above, the validity of the claims which are discussed by the Court of Appeal is dependent upon the validity of the "illegal ouster" cause of action. Certainly, the jury was improperly told that it could rely on the "illegal ouster" theory, on which all of the plaintiff's claims were based.

In *McGee v. Cessna Aircraft Company*, 82 Cal.App.3d 1005 (1978), the party that had prevailed at trial argued that "the judgment below should not be reversed if there is substantial evidence to support the verdict even though the case was submitted to the jury on a wrong theory of law." 82 Cal.App.3d at 1019. The *McGee* court, unlike the Court of Appeal in the present case, rejected the argument, finding that "this rule has no application where the jury has been erroneously instructed," and that a "[j]udgment obtained based on a wrong application of the law cannot stand." 82 Cal.App.3d at 1019.

Even if the secondary causes of action asserted by the plaintiff were in some sense independent of the invalid "illegal ouster" claim, this court was required to examine the whole record in order to evaluate the effect of the erroneous instructions given on a nonexistent cause of action.

In *LeMons v. Regents of University of California*, 21 Cal.3d 869 (1978), this court recognized that "there is no precise formula for measuring the effect of an erroneous instruction" given to a jury. 21 Cal.3d 876. However, several factors were set forth to be considered in measuring the degree of prejudice, including the degree of conflict in the evidence on critical issues, the arguments to the jury of the prevailing party's attorney, whether the jury requested a rereading of an erroneous instruction or of related evidence, the closeness of the jury's verdict, and the possible effect of other instructions. 21 Cal.3d at 876. Applying these factors, it is clear that the manifest errors of the trial court in this case were prejudicial.

Almost the entire trial concerned the "illegal ouster" theory. There was a great deal of conflict in the evidence concerning the creditworthiness of the plaintiff, and the reasonableness of the refusal of the defendant Riverside National Bank to make new loans. The erroneous "illegal

ouster" instructions were serious errors affecting all causes of action.

A recent decision of the Supreme Court illustrating the procedure that should be employed by an appellate court upon finding instruction error is *Weiner v. Fleishman*, 54 Cal.3d 476 (1981). After finding an instructional error, whereby the plaintiff was assigned a burden of proof that was higher than the law requires, the Supreme Court proceeded to determine whether the erroneous instruction required reversal of the judgment. It was noted that instructional error, according to the California Constitution, may be the basis of reversal of a judgment only after "an examination of the entire cause" has led to the conclusion that the error has resulted in a "miscarriage of justice." 54 Cal.3d at 490. After studying the "entire cause," the court found the jury instruction that was challenged by the plaintiff to be prejudicial. 54 Cal.3d at 490-491.

"Prejudicial error is established where *the record as a whole* reveals a reasonable probability that a result more favorable to the appealing party would have been reached in the absence of the error." (Emphasis added.) *Rimmele v. Northridge Hospital Foundation*, 46 Cal.3d 123, 131 (1975). Thus, it appears necessary for an appellate court, determining prejudicial error, to review "the record as a whole."

Had the Court of Appeal fulfilled its duty to review the entire record, not just the first amended complaint, it would have undoubtedly concluded that the "illegal ouster" instructions were prejudicially erroneous, requiring a new trial on all issues, assuming that some cause of action survives. The invalid "illegal ouster" theory pervaded the entire six week trial, leading both the trial judge and the jury into error.

IV.

The Twenty Two Issues Set Forth in the Appellants' Opening Brief Were All Properly Presented, but the Court of Appeal Has Misstated or Failed to Consider All of Them.

In addition to failing to follow the correct analysis, after finding instructional error, the Court of Appeal has failed to deal appropriately with other issues raised by the defendants in their opening brief. Twenty two separate issues of law were presented, and all of them were in proper form, requiring resolution by the Court of Appeal. The court had no right to reformulate the issues or simply ignore them.

An issue of law is one that "can be resolved by examining relevant cases and statutes and applying the rules of law extracted from those sources to an established set of facts." CEB *California Civil Appellate Practice,* section 4.4, page 65 (2d ed. 1985); *Board of Education v. Jack M.,* 19 Cal.3d 691, 698, fn. 3 (1977); *Morrison v. State Board of Education,* 1 Cal.3d 214, 238 (1969). An issue of law is not necessarily limited to a particular ruling by a trial judge, but can involve a variety of other issues such as the sufficiency of the pleadings, the sufficiency of the evidence, the interpretation of a writing or a statute, and the choice of law to be applied, to name but a few.

An issue of fact, on the other hand, can be resolved only by considering conflicting evidence. *Board of Education v. Jack M.,* 19 Cal.3d 691, 698, *fn.* 3 (1977). It has been explained that "[a]n issue that requires the trial court to evaluate the evidence by weighing the strength of one party's proof against that of the other, or by considering the credibility of witnesses or other evidence, presents a question of fact." CEB *California Civil Appellate Practice,* section 4.5, page 65 (2d ed. 1985).

The appropriate standard of review on appeal is dependent upon whether the issue to be determined is a question of law or a question of fact. Consequently, learned authors have emphasized the critical importance of the distinction between the two. Eisenberg, Horvitz & Wiener, *California Practice Guide: Civil Appeals & Writs* section 8:2 (1992).

While the distinction between questions of fact and law is easily drawn in some cases, it is more subtle and blurred in others. This is especially so with regard to mixed questions which the California Supreme Court described as:

> "[T]hose 'in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' " *People v. Louis*, 42 Cal.3d 969, 984 (1986).

In *Louis*, our Supreme Court analyzed in detail the rationale behind the different standards of review to be applied to questions of fact and law, the three distinct steps to be followed in deciding a mixed fact-law question, and concluded that the "*proper standard for mixed questions appears to be independent review.*" 42 Cal.3d at 984, 985-987. The court explained that "[t]his is so because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles." 42 Cal.3d at 987.

It is evident from an analysis of the twenty two issues raised in the appellants' opening brief in this case that each of those is either a pure issue of law or a mixed question in which legal determinations predominate. Issue one deals with federal preemption; issue two with the trial court's lack of

jurisdiction and instructional error; issues four, six, eight, ten, eleven, thirteen, seventeen, eighteen, nineteen, and twenty with sufficiency of the pleadings and of the evidence, and issues three, five, seven, nine, twelve and fourteen with instructional error. Issue fifteen relates to the erroneous admission of evidence, sixteen to the erroneous exclusion of evidence, twenty one to the award of attorneys' fees, and twenty two to judicial impartiality.

Unfortunately, the Court of Appeal asserts that some or all of the instructional errors urged by the defendants were not properly preserved at the trial court level. In making this assertion, the court is simply wrong.

Due to an express statutory provision, litigants are not required to object to legally incorrect jury instructions, in order to preserve the error. *Code of Civil Procedure* section 647 provides in relevant part that the "giving [of] an instruction, refusing to give an instruction, or modifying an instruction requested" are all matters which are "deemed excepted to." Consequently, when an instruction erroneously states the law, a party's failure to object or propose a correct instruction will not bar it from raising the error on appeal. *Lua v. Southern Pacific Transportation Company,* 6 Cal.App.4th 1897, 1904 (1992); *Mock v. Michigan Millers Mutual Insurance Company,* 4 Cal.App.4th 306, 333 (1992).

In the instant case, it is unnecessary to resort to such statutory presumptions, since the trial court acknowledged on the record that the defendants had preserved their objections to the jury instructions given. Although the trial judge spent two and one half days settling the jury instructions with counsel, he would not allow most of the proceedings to be on the record, despite the defendants' protests. [R.T. 15, 2972, 3041:26-3042:2.] Consequently, defendants' trial counsel memorialized the unusual understanding arrived at with the judge about preservation of any instructional error for appel-

late review. The trial judge agreed on the record that the defendants were deemed to have objected to all instructions to be given. The following exchange between the defendants' co-trial counsel, Mr. Jeff Scott and the court is found in the trial transcript:

> "MR. SCOTT: We've had two-and-one-half days discussing jury instructions, some in chambers, some in open court. Approximately one-half day was held on the record, Monday afternoon, February 27th. We discussed certain objections on the record. Many of my other -- defendants' other objections to jury instructions were not made on the record. *The court denied a request to have it on the record on the grounds that the Court stated that all objections would be preserved for appeal. That was the Court's understanding, in any event.* I just want that reflected on the record, that we wished to have it on the record, we were denied that request, we're reserving all our rights to object to jury instructions, and I will file with the Court a memorandum re the same objections to jury instructions, which would make our record, to some extent, in this matter. Thank you, your Honor.
>
> "THE COURT: Okay. All right. This memorandum is ordered filed. Okay. Let's go." (Emphasis added.) [R.T. 15, 3043:21-3044:9, J.A. 6, 1610.]

The proper procedure, that should have been followed in this case, was to examine each of the twenty two issues presented by the defendants separately. If errors were found, then the court should have examined the entire record, to determine whether the errors were prejudicial. By failing to

follow the proper procedure, the Court of Appeal has effectively denied the defendants of their right to appeal. It has also failed to address the material facts of the case, since most of the record, apart from the first amended complaint, was not even examined by the court.

V.

The Court of Appeal, Having by Its Own Admission Failed to Review the Whole Record, Has Seriously Misstated Many Material Facts and Has Omitted to Mention Many Others.

Commencing with the faulty premise that the "facts underlying this appeal essentially are not in dispute" [Opinion, page 5], the decision filed by this court is riddled with factual errors and omissions. Contrary to the court's conclusion, there are numerous factual issues in dispute. For instance, a material factual dispute that permeated the trial was whether it would have been a prudent banking practice to renew the loans totalling $750,000.00 to the plaintiff, the largest shareholder in the bank, while he was a director of the bank and his financial condition was deteriorating materially. Another highly disputed issue was whether Mr. Billings and the other directors had acted in good faith and without malice when they adopted the bylaw that led to the plaintiff's removal as a director.

Based simply on the fact that the board of directors called a special meeting which the plaintiff chose not to attend, this court makes the unsubstantiated assumption that the plaintiff "allegedly was not given notice of the special meeting at which the bylaw was amended." (Opinion, page 6.)

The Court of Appeal acknowledges that its statement of facts is taken solely from the plaintiff's first amended complaint. (Opinion, page 5, fn. 3.) However, it ignores or overlooks material factual discrepancies in its recitation of

facts. For instance, at pages 6, 9, and 10 of its Opinion, the court repeats, and thereby adopts, the plaintiff's admissions in his pleadings that he was in default on his loans from the bank when the bylaw was enacted in February 1987. However, at page 14 of its Opinion, the court appears to change its view of the facts and states that, when the bylaw was enacted, "plaintiff was 30 days in default on only one loan and that default occurred because defendant Billings refused to extend or renew that loan."

It is pertinent to point out that the court's statement that, "[o]nce RNB credited that $4,000 payment, plaintiff was not in default and, in fact, was current on all interest payments up through January 18, 1987," is in error. (Opinion, page 14.) The record shows that, as of February 1987, the plaintiff was past due for one quarterly interest payment on his $271,405.14 loan from January 30, 1987; three monthly interest payments and three and a half months in principal on his $350,000.00 loan; three interest payments on his $63,000.00 loan; and his entire $30,000.00 loan, which was due to be paid off in full on January 26, 1987. [J.A. 11, 3055; R.T. 11, 2307-2318.]

The court faults the defendants for failing to cite adequately to the record. (Opinio, pages 22-23.] The appellants' opening brief originally filed by the defendants contained 346 citations to the record in the 33 pages contained in the initial statement of facts. Consequently, every fact alleged, as well as every pleading, evidentiary, and instructional error asserted by the defendants, in their opening brief, was well substantiated. The amended brief filed by the defendants, in accordance with this court's instructions, contained 544 citations to the record in the fact and argument sections of the brief combined. The defendants complied with this court's order by merely referring back to the citations to the record contained in the statement of facts, and repeating those citations in the argument section of the opening brief. Despite

a thorough research of the issue, this opinion appears to be the first to require record citations in the argument section of an opening brief despite proper citations to the record in the statement of facts section of the same brief.

In its discussion of the defamation cause of action, the Court of Appeal inexplicably chooses December 31, 1986, to test the truth or falsity of the defendants' statements regarding the plaintiff, although the court does not dispute that all the allegedly defamatory publications were made in March or April of 1987. (Opinion, page 40.) As seen previously, the plaintiff was past due on several of his loans both in interest and principal. [J.A. 11, 3055; R.T. 11, 2307-2318.] The truth of a publication must, of course, be tested on the date of the publication, and not on some other arbitrary date which conveniently fastens liability on innocent defendants.

The Court of Appeal makes the incredible accusation that the defendants have not cited to the record in support of their contention that "no evidence was presented at trial to establish the contractual relationship between plaintiff and defendants." (Opinion, page 45.) Absence of evidence is impossible to establish by citation to the record. This is perhaps best exemplified by the court's effort to do so. The court announces that the plaintiff's "allegation regarding the `loan transactions' although cursory and conclusionary [sic] nevertheless adequately alleges the requisite underlying contract between plaintiff and defendants." (Opinion, page 46.)

If this court's pronouncement is correct, every borrower would have such a contract with a bank, based on prior loan transactions, regardless of the borrower's present credit worthiness. If the defendant bank were to follow such a policy it would risk involuntary loss of its deposit insurance. See, for example, 12 *U.S.C.* 1818. Merely because Mr. Billings had previously extended the due dates for the plaintiff's payment of the principal owed on the loans in question, so long as he

was current on the interest payments, simply cannot be sufficient to establish either an oral agreement or an implied agreement to renew the loans indefinitely, regardless of the plaintiff's financial condition. (Opinion, pages 47-48.)

This court repeatedly refuses to consider issues on the alleged ground that the defendants have not included a reference to the record on appeal. One such instance is found at page 51, *fn.* 22. Contrary to this court's assertion, the defendants did cite to the record in complaining of such instructional error. The exact sentence reads: "Moreover, any decision not to renew plaintiff's loans would have to be based upon 'objective criteria and criteria upon which a reasonable loan officer, in the exercise of his discretion, would have adopted.' [J.A. 6, p. 1677.]" (Appellants' opening brief at page 35.)

At page 75 of its Opinion, this court again accuses the defendants of failing "to identify the purportedly `probative and exculpatory evidence' in question." However, at page 31 of the appellants' opening brief it is stated:

> "The trial court granted the plaintiff's motions *in limine* to exclude all evidence pertaining to the plaintiff's filing for bankruptcy at an earlier date and regarding his trip to Hawaii with a ladyfriend when he was separated from his wife, even though evidence of plaintiff's financial success and good character was permitted. [R.T. 2, pp. 59-64.] As a result, the court would not permit defendants to establish absence of malice by showing that Mr. Billings had requested the draft bylaw to be changed so that a prior filing of bankruptcy, by a director or candidate for the position, would not result in disqualification from the

board of Riverside National Bank. [R.T. 4, pp. 529-532.]"

Mr. Billings knew that the plaintiff had filed for bankruptcy previously. Therefore, if Mr. Billings really had an *animus* to remove the plaintiff from the board, rather than to induce him to pay off his loans, Mr. Billings should have accepted the draft bylaw proposed by the Bank's attorneys. The plaintiff could not cure a disqualification based upon his prior bankruptcy. However, Mr. Billings did not accept the attorneys' proposal. Instead, Mr. Billings wanted a revised bylaw which would permit the plaintiff to cure his default. Exclusion of such exculpatory evidence is clearly prejudicial to all defendants, both on liability and damages, especially punitive damages. The above cited are but a few of the numerous material omissions and misstatements of fact contained in the recent decision filed by this court.

VI.

Conclusion.

Based on the foregoing argument and authorities, it is requested that this petition for rehearing be granted so that justice may prevail.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on December 2, 1993, I served the within *Petition For Rehearing* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401
(*By Express Mail: Original and Four Copies*)

Clerk, California Supreme Court
Ronald Reagan Building
300 South Spring Street,
2nd Floor
Los Angeles, California 90013
(*Five Copies*)

Clerk of the Superior Court
for the County of Riverside
The Honorable John P.
Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Mr. Roy Morrow Bell
Mr. Fletcher W. Paddison
Mr. Thomas T. Lord
Miller, Boyko & Bell
550 West "B" Street, Suite 400
San Diego, California
92101-3599

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 2, 1993, Los Angeles, California.

Betty J. Malloy
(Original Signed)

APPENDIX H

FILED
RIVERSIDE COUNTY
JUL 23 1987
WILLIAM E. CONERLY, Clerk
By

MILLER, BOYKO and BELL
A Professional Corporation
550 West "B" Street, Suite 400
SAN DIEGO, CALIFORNIA 92101-3599
(619) 235-4040

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 FIRST AMENDED COMPLAINT FOR ILLEGAL OUSTER OF PLAINTIFF AS A DIRECTOR; INVASION OF PRIVACY; BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING; DEFAMATION; AND INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS

COMES NOW the plaintiff, Nicholas E. Tavaglione, who for causes of action against defendants, and each of them, alleges as follows:

FIRST CAUSE OF ACTION

[Illegal Ouster of Plaintiff as a Director]

1. Plaintiff Nicholas E. Tavaglione ["Tavaglione"] at all times material hereto has been a resident of Riverside County, California.

2. Defendant Riverside National Bank is a national banking corporation organized and existing pursuant to the laws of the United States. Riverside National Bank [the "Bank"] has its principal place of business in Riverside County, California.

3. Defendant Timothy C. Billings ["Billings"] is the President and a director of Riverside National Bank. Defendants Dolores Magnuson, Maryann Archambault, Leon Sigerman, J. Richard Swartz, and Roy E. Whitehead are directors of Riverside National Bank. Defendants, and each of them, personally committed, authorized or ratified the actions set forth herein.

4. Plaintiff is at present unaware of the true names, identities or capacities, whether individual, corporate, associate or otherwise, of those defendants sued herein as Does 1 through 100, inclusive, and therefore sues said defendants by such fictitious names. Plaintiff will ask leave to amend this complaint so as to set forth the same when the same has been ascertained. Plaintiff is informed and believes and thereon alleges that those defendants sued herein by such fictitious names, and each of them, are in some way responsible for the acts and events complained of herein, and proximately caused the injury and damages to plaintiff complained of herein. Plaintiff will ask leave to amend this complaint so as to more

specifically set forth the same when the same has been ascertained.

5. Plaintiff is informed and believes and thereon alleges that defendants, and each of them, were the agents, employees, and servants of each other, and that at all times relevant hereto, said defendants were acting within the course, scope and purpose of such agency, service and employment.

6. Plaintiff Tavaglione has been a shareholder of the Bank since approximately 1965. Plaintiff has served as director of the Bank since approximately 1974.

7. In April, 1986, plaintiff was the holder of 245,542 shares, constituting 13.4 percent of the outstanding and issued shares of the Bank. At this time, plaintiff holds approximately 8.5 percent of the outstanding and issued shares of the Bank. At all times material hereto, plaintiff has been, and is, the largest shareholder in the Bank.

8. In or about April, 1986, the Bank held its annual shareholder's meeting as required by its bylaws, as well as state and federal law. At the shareholders meeting, plaintiff, and the individual defendants, were each elected to serve as a member of the board of directors of Riverside National Bank. Pursuant to the Bank's bylaws, and as provided for by law, plaintiff was to serve as a director until the next annual shareholders meeting in April, 1987.

9. On or about February 3, 1987, plaintiff was advised by the Bank President, defendant Billings, that a new bylaw would be proposed to the board of directors which would regulate the appointment and qualification of directors. The bylaw, as proposed, is attached hereto as Exhibit "A" and incorporated by reference. The bylaw provided that any individual who had been in default more than 30 days under a loan to <u>any</u> financial institution would be disqualified from acting as a director of the Bank for a period of one year.

Further, the bylaw provided that such an individual would be disqualified even if the default was cured and was not a material default. The bylaw as proposed was to be applied retroactively.

10. Plaintiff is informed and believes and thereupon alleges that the bylaw was drafted upon instruction of the President of the Bank, defendant Billings, with the intent and purpose of:

(a) Ousting plaintiff as a director of the Bank;

(b) Depriving plaintiff of his right as shareholder to elect directors to the boards;

(c) Publicizing plaintiff's loan defaults; and

(d) Forcing plaintiff to sell his shares of the Bank.

11. As of February 3, 1987, plaintiff had loans from the Bank which had been in default for more than 30 days. Prior to February, 1987, there were no bylaws or board resolutions which regulated the loans or loan defaults of a Bank director, and no bylaw which disqualified a director because of any such defaults had ever been proposed.

12. Prior to February 26, 1987, plaintiff was not afforded the opportunity to cure the loan defaults and thereby avoid the effect of the bylaw. The bylaw as applied by defendants was retroactive, automatically disqualifying plaintiff as a director and as applied would have disqualified plaintiff even if his defaults had been cured by February 26, 1987.

13. The meetings of the board of directors take place on the third Wednesday of each month in accordance with the bylaws of the Bank. Plaintiff attended the regular monthly meeting of the board of directors on February 18, 1987. The bylaw was not passed or voted upon at that meeting.

14. The bylaws provide for the calling of special meetings of the board of directors. Pursuant to the bylaws, written notice of the meeting is required except when notice of the meeting is given "in person."

15. On February 26, 1987, a purported special meeting of the board of directors was held. Plaintiff was not given notice of the meeting in accordance with the bylaws. This meeting was improperly noticed and was an illegal meeting of the board of directors.

16. At the "meeting" on February 26, 1987, the board purportedly adopted the bylaw, in its final form, a true and correct copy of which is attached hereto as Exhibit "B" and incorporated herein by reference.

17. Pursuant to the purported "bylaw" the board of directors announced that plaintiff has been summarily removed from the board. Attached hereto as Exhibit "C" and incorporated by reference is a true and correct copy of such notice from Delores Magneson, Chairman of the Board.

18. The Bank is a federally-charted banking institution. As such, it is subject to the provisions of the National Bank Act as set forth in 12 U.S.C. §1, et seq. Except where the federal statute has stated a different rule, however, the Bank is subject to state law and the rules governing the organization and management of the Bank as a corporation.

19. Pursuant to California Corporations Code §303, "a director may not be removed prior to the expiration of such director's term of office" except as provided in the Code. Pursuant to California Corporations Law, a director may only be removed if he has been declared of unsound mind or has been convicted of a felony [§302], the director has been removed by vote of the shareholders as set forth in §303(a)(1), or the director has been removed, for cause, by the Superior Court pursuant to Corporations Code §304. Plaintiff was not,

and could not have been, removed pursuant to these provisions.

20. Pursuant to the California Corporations Code, plaintiff could not be removed as a director of the corporation. Plaintiff was duly elected at a shareholders meeting in April, 1986, and was entitled to serve out the remaining term of his office. In violation of Corporations Code §303, plaintiff has been improperly and illegally ousted as a director of the corporation.

21. Further, the bylaw, as adopted, provided that director was disqualified only if the director was in default for 30 days after February 18, 1987. The board of directors, however, intended the bylaw to disqualify plaintiff and applied the bylaw retroactively, and as an ex post facto provision, which automatically disqualified plaintiff. The bylaw provision was not applied fairly as to all directors and plaintiff was not treated the same as other directors who were similarly situated.

22. As a result of the illegal ouster of plaintiff as a director of the corporation, plaintiff has been denied access to the board of director meetings and the other rights and privileges as a director of a corporation. More significantly, plaintiff, as a shareholder of the corporation, has been denied representation on the Bank's board.

23. Pursuant to the bylaws, the Bank's annual shareholders meeting had been set by the board for April 15, 1987. Without cause, defendants wrongfully continued the shareholders meeting and failed and refused to hold a meeting on April 15, 1987, in violation of the Bank's bylaws and state and federal law. No date for the shareholders meeting has been set. As a result of defendants' actions, plaintiff has been denied representation on the board of directors.

24. As a direct and proximate cause of the illegal action of defendants, and each of them, plaintiff has been

illegally ousted as a director of the corporation and denied his rights as a shareholder. Plaintiff has sustained damages in an amount to be proven at trial.

SECOND CAUSE OF ACTION

[Defamation]

25. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 24, inclusive, and incorporates the same as though set forth in full.

26. In or about March, 1987, defendants, and each of them, published, or caused to be published, statements that plaintiff had been ousted as a member of the board of directors because of significant and substantial loan defaults with the Bank.

27. In or about March and April, 1987, defendants published or caused to be published statements concerning the outstanding loans of plaintiff to the Bank and the fact that such loans had been in default for more than 30 days. In addition to the statements stated above, and other statements, defendants published, or caused to be published, the statement that:

> Tavaglione, who is a Riverside National director for 13 years, was ousted from the Bank's board in late February after board members voted to remove any director who fell behind on loan payments to the Bank. At the time, Tavaglione had delinquent loans at the Bank totalling $714,705.00 according to Bank documents. [Emphasis added.]

28. The publications would be understood to state that:

(a) Plaintiff had defaulted upon substantial loans to the Bank;

(b) Plaintiff's defaults were material and could not be cured by plaintiff;

(c) Plaintiff's defaults affected the financial condition of the Bank;

(d) Plaintiff's financial condition was unstable; and

(e) Plaintiff's position as a director of the Bank placed plaintiff in a conflict of interest such that plaintiff would not act in the best interests of the Bank.

29. Defendants, and each of them, intended that the publications be understood in the manner alleged above. Defendants further intended that these statements be understood to state that plaintiff was a bad credit risk and defendants thereby intended to harm and injure plaintiff in his ability to obtain an extension of credit from other financial institutions.

30. Plaintiff is a real estate developer in Southern California and in the operation of his business he is dependent upon extensions of credit from financial institutions for the purposes of completing various construction projects. The publications were intended to harm and injure plaintiff in his activities as a developer and to force plaintiff into selling his shareholdings in the Bank. Defendants, and each of them, intended the statements to cause other financial institutions to refuse plaintiff further extensions of credit until all existing loan defaults were cured. At the time of the statements, defendants, and each of them, knew that the publication of the statements could cause other financial institutions to call their loans and to refuse further extensions of credit to plaintiff until any existing defaults were cured.

31. As a direct and proximate result of defendants' statements, plaintiff's financial condition and his reputation in

the community were materially damaged. As a result, plaintiff was required to cure all existing loan defaults and to pay off several loans with the Bank, which required plaintiff to sell his shareholdings in the Bank at less than their fair market value. In order to effect the sale of his shares, plaintiff entered into an agreement to sell his shares to the Bank of Hemet.

32. In or about April of 1987, plaintiff entered into an agreement with the Bank of Hemet on the sale of his shares in the Bank in order to cure existing defaults and pay off certain loans to the Bank. In April, 1987, defendant Billings wrote to the shareholders of the Bank stating that plaintiff's agreement with the Bank of Hemet was "illegal" and was not in the best interests of the Bank. These statements are false and accused plaintiff of illegal conduct that was inimical to the interests of the Bank.

33. As a result of defendants' publications, plaintiff has been held up to embarrassment, contempt and ridicule and has been materially injured in connection with his trade, business and occupation. Plaintiff's reputation and standing in the community has been damaged in that plaintiff is now believed to be financially unstable and to have engaged in illegal acts. Further, plaintiff's credit and reputation with institutional lenders has been damaged and plaintiff has been denied extensions of credit by such institutions as a direct and proximate result of defendants' publications.

34. As a direct and proximate result of defendants' actions, plaintiff has been forced to sell his stock in Riverside National Bank at book value, which is an amount far less than the actual fair market value of the stock.

35. As a result of defendants' actions, plaintiff has incurred damages in the amount of $1,500,000.00.

36. Defendants actions were oppressive and malicious and with the intent to injure plaintiff in his reputation and in

conscious disregard of plaintiff's rights and interests, whereby plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

THIRD CAUSE OF ACTION

[Wrongful Disclosure of Confidential Information]

37. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 36, inclusive, and incorporates the same as though set forth in full.

38. At all times material hereto, plaintiff had been depositor and a loan customer of the Bank. Prior to February, 1987, plaintiff, or his companies, had been issued loans by the Bank, in accordance with its customary business practices. The loans to plaintiff were tendered upon same or similar terms as were made available to other individuals in the community.

39. Plaintiff reposed trust and confidence in the Bank to maintain his financial privacy and the confidentiality of his loan transactions and records.

40. As of February, 1987, plaintiff, or his companies, had been in default under the terms and provisions of the various loans with the Bank. In February, 1987, defendants conspired amongst each other and agreed upon a plan to utilize plaintiff's loan defaults as a pretense for ousting plaintiff from the board of directors and thereafter publicizing plaintiff's ouster and his loan defaults in order to damage plaintiff's credit standing and thereby force plaintiff to sell his shareholders in the Bank.

41. Defendants, and each of them, had a duty to maintain the confidentiality and privacy of plaintiff's loan accounts with the Bank.

42. In furtherance of this plan and conspiracy, defendants, as alleged above, adopted a bylaw which purportedly

removed plaintiff from the board of directors in violation of California Corporations Code 303(c).

43. Thereafter, and in March, 1987, defendants published or caused to be published statements in the Riverside Press Enterprise as follows:

> Riverside National Bank removed Nicholas E. Tavaglione from its Board of Directors because the Riverside contractor fell behind on loan payments to the Bank, according to Bank document [sic].
>
> * * *
>
> J. Richard Swartz, Riverside National Bank's Executive Vice President, yesterday maintained that only Tavaglione's loan delinquencies triggered his ouster.
>
> Swartz who is a Board member said the Board decided to change the Bank's bylaws in February to prevent a Director who fell behind in loans from staying on the Board. Although the change resulted from Tavaglione's loans, it was not aimed at him alone, he said.

In March and April, 1987, defendants published, or caused to be published, statements that plaintiff's loans or defaults were substantial and necessitated plaintiff's ouster from the Bank.

44. In March, 1987, defendants caused a proxy statement to be delivered to the shareholders of the Bank. At the time of the preparation of the proxy statement, plaintiff was not a director of the Bank and had not been nominated to act as director of the Bank. Notwithstanding this, the proxy statement published the fact that plaintiff was a guarantor of substantial loan and that such loans were in default.

45. These publications stated and implied, or were intended to state and imply, that:

(a) Plaintiff had defaulted upon substantial loans to the Bank;

(b) Plaintiff's loan defaults were material and could not be cured;

(c) Plaintiff represented a poor credit risk whose defaults jeopardized the interests of the Bank;

(d) Plaintiff's financial condition was unstable; and

(e) Plaintiff had a conflict of interest which prevented him from fairly representing the interests of the Bank and its shareholders.

46. The publication and disclosure of plaintiff's loan information violated defendants' duty to maintain the privacy and confidentiality of the statements.

47. As a direct and proximate result of defendants' actions, plaintiff has been required to sell off his shares in the Bank at less than fair market value and has incurred damages in the total amount of $1,500,000.00.

48. Defendants' actions were intentional, malicious and oppressive and in conscious disregard of the rights and interests of plaintiff, with the intent to prevent plaintiff from taking an active participation in the Bank and thereby to force plaintiff to sell his shareholdings in the Bank, whereby plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

FOURTH CAUSE OF ACTION

[Breach of the Implied Covenant of Good Faith and Fair Dealing]

49. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 48, inclusive, and incorporates the same as though set forth in full.

50. In February, 1987, plaintiff acted as a director of Riverside National Bank. Plaintiff had served as a director since approximately 1974.

51. As of February, 1987, plaintiff was the largest shareholder of the Bank and was a depositor and a loan customer of the Bank.

52. Plaintiff, as a loan customer of the Bank, reposed trust and confidence in the Bank to maintain the financial privacy of his records. Plaintiff, as a shareholder of the Bank, reposed trust and confidence in defendants, and each of them, to protect plaintiff's rights as a shareholder, including the right to vote for and elect directors to the board.

53. Defendants, and each of them, held a duty to plaintiff to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank. Defendants had the further duty to deal fairly and in good faith with plaintiff as a shareholder in the Bank to preserve and protect plaintiff's rights as a shareholder.

54. Defendants breached the implied covenant of good faith and fair dealing by:

(a) Formulating a plan and conspiracy to utilize plaintiff's loan defaults as the pretext for removing plaintiff from the board;

(b) Improperly removing plaintiff as a director of the corporation in violation of Corporations Code 303(c) and thereby nullifying plaintiff's rights as shareholder to elect directors;

(c) Failing to give plaintiff an opportunity to cure his loan defaults prior to the adoption of the bylaw;

(d) Utilizing plaintiff's illegal ouster from the board as a pretense for subsequently publishing confidential and private information concerning plaintiff's loan accounts with the Bank and the defaults under these loans; and

(e) Formulating and implementing this plan to force plaintiff into selling his shareholdings in the Bank.

55. As a direct and proximate result of defendants' actions, plaintiff was held up to public contempt and ridicule, plaintiff's credit relationship with the Bank was jeopardized, plaintiff's credit relationships with other banks and lending institutions was adversely affected and plaintiff was forced to sell his shareholdings in the Bank in order to pay off or otherwise cure plaintiff's credit obligations to other lending instructions.

56. As a direct and proximate result of defendants' acts, plaintiff has been required to sell off his shares of the Bank at less than their fair market value, and has incurred other damages, in the total amount of $1,500,000.00.

57. Defendants' actions were intentional, malicious and oppressive and in conscious disregard of the rights and interests of plaintiff and with the intent to prevent plaintiff from taking any participation in the Bank and to force plaintiff to sell his shareholdings in the Bank, whereby plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

FIFTH CAUSE OF ACTION

[Interference With Contractual Relationships]

58. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 57, inclusive, and incorporates the same as though set forth in full.

59. Plaintiff has been a shareholder of the Bank since approximately 1965, and has been an active member of the board of directors since approximately 1974. From time to time, plaintiff, or the corporations controlled by plaintiff, have been extended credit upon terms and conditions which are the same as extensions of credit to other members of the community. In 1987 plaintiff, or his companies, held loans from the Bank which were in excess of $1,000,000.00.

60. In or about February, 1987, defendants formulated a plan and conspiracy to interfere with plaintiff's business and economic relationship with the Bank and agreed with one another to take the actions as alleged herein.

61. In February, 1987, the board of directors of the Bank improperly voted to remove plaintiff as a member of the board of directors. The purported justification for the illegal removal was plaintiff's defaults, or the defaults of plaintiff' companies, on the extensions of credit by the Bank.

62. Thereafter, and in March and April, 1987, defendants, and each of them, publicized plaintiff's loan defaults.

63. In April, 1987, plaintiff entered into an agreement with the Bank of Hemet on the sale of his shares in order to cure the existing loan defaults and pay off certain loans to the Bank. In April, 1987, defendant Billings wrote to the shareholders of the Bank stating that plaintiff's agreement with the Bank of Hemet was "illegal" and not in the best interests of the Bank.

64. At all times material hereto, defendants, and each the Bank and of them, knew of plaintiff's loan contracts with plaintiff's status as a shareholder of the Bank.

65. Defendants, by these actions, intended to interfere with plaintiff's ongoing business and economic relationship with the Bank, as a shareholder, a director, and loan customer.

66. In planning to remove plaintiff as a director of the Bank based upon plaintiff's loan defaults, in removing plaintiff as a director, in subsequently publicizing plaintiff' loan defaults, and in writing to the Bank's shareholders that plaintiff had entered into an illegal contract, defendants interfered with plaintiff's business and economic relationship with the Bank as a director, shareholder and loan customer.

67. As a direct and proximate result of defendants' actions, plaintiff was ousted as a member of the board of directors, was subject to contempt and ridicule among the community and the Bank's shareholders and has had his contractual relationships with the Bank disrupted. As a direct and proximate result of defendants' action, plaintiff has sustained damages in the amount of $1,500,000.00.

68. Defendants' actions were intentional, malicious and oppressive and in conscious disregard of the rights and interests of plaintiff, with the intent to prevent plaintiff from taking an active participation in the Bank and to force plaintiff to sell his shareholdings in the Bank, wherefore plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

SIXTH CAUSE OF ACTION

[Interference with Contractual Relations and Prospective Advantage]

69. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 68, inclusive, and incorporates the same as though set forth in full.

70. In February, 1987, plaintiff had established banking relationships with lending institutions other than the Bank, including but not limited to Mechanic's Bank. Specifically,

plaintiff had loans from other lending institutions and had established working relationships with these lenders such that plaintiff would be granted further extensions of credit upon request.

71. Defendants, and each of them, were aware of plaintiff's relationship with these lenders, and plaintiff' prospective relationship with these lenders.

72. In February, 1987, defendants, and each of them, deliberately expelled plaintiff as a member of the board of directors. This was based upon plaintiff's loan defaults at the time. Defendants subsequently publicized this information and further publicized the fact that plaintiff had been in default on his loans with the Bank and that this necessitated plaintiff's ouster from the board of directors.

73. Defendants, and each of them, knew that the publication of this information would cause other lending institutions to either call plaintiff's loans or restrict further extensions of credit to plaintiff.

74. Defendants, and each of them, intentionally performed these acts in order to disrupt and interfere with plaintiff's relationships with these other lending institutions and to cause the lending institutions to make demand upon existing loans or to refuse further extensions of credit to plaintiff.

75. As a direct and proximate result of defendants' actions, plaintiff's banking relationships with the other lenders was disrupted, plaintiff was refused further extensions of credit, and plaintiff has been required to pay off loans with certain lenders and cure defaults on other loans with various lenders. As a direct and proximate result of defendants' actions, plaintiff has sustained damages in the amount of $1,500,000.00.

76. Defendants' actions were intentional, malicious and oppressive and in conscious disregard of the rights and

interests of plaintiff, with the intent to prevent plaintiff from taking an active participation in the Bank and to force plaintiff to sell his shareholdings in the Bank, wherefore plaintiff is entitled to an award of punitive damages in the amount of $3,000,000.00.

SEVENTH CAUSE OF ACTION

[Negligent Interference With Contractual Relationships]

77. Plaintiff hereby repeats and realleges the allegations contained in Paragraphs 1 through 76, inclusive, and incorporates the same as though set forth in full.

78. Defendants, and each of them, knew or should have know of plaintiff's relationship with these lenders and plaintiff's prospective relationship with these lenders.

79. Defendants, and each of them, were aware of plaintiff's relationship with these lenders, and plaintiff's prospective relationship with these lenders.

80. Defendants, and each of them, knew or should have known that these acts would interfere with plaintiff's relationships with the other lending institutions.

81. Defendants by their actions negligently interfered with plaintiff's contracts with the other lending institutions.

82. As a direct and proximate result of defendants' actions, plaintiff's banking relationships with the other lenders was disrupted, plaintiff was refused further extensions of credit, and plaintiff has been required to pay off loans with certain lenders and cure defaults on other loans with various lenders. As a direct and proximate result of defendants' actions, plaintiff has sustained damages in the amount of $1,500,000.00

WHEREFORE, plaintiff prays judgment against defendants,and each of them, as follows:

1. For compensatory damages in an amount to be proven at trial but estimated to exceed $50,000.00;.

2. For compensatory damages in the amount of $1,500,000.00;

3. For punitive damages in the amount of $3,000,000.00;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem just and proper.

DATED: July 21, 1987 MILLER, BOYKO AND BELL

By _____

ROY MORROW BELL
FLETCHER W. PADDISON
Attorneys for Plaintiff

SECRETARY'S CERTIFICATE

I, the undersigned, do hereby certify:

1. That am the duly elected and acting Executive Vice President and Cashier of Riverside National Bank ("Bank"), a national banking association; and

2. That the following is a true and correct copy of a resolution of the Bank adopted with a quorum present at a regular meeting of the Bard of directors held on the _____ day of _____, 1987.

BE IT HEREBY RESOLVED, that ARTICLE I, Section 1.3 of the Bylaws of the Bank be, and it hereby is, amended to read as follows:

> "Section 1.3. Nominations for Director. Nominations for election to the Bard of Directors may be made by the Board of Directors or by any stockholder of any outstanding class of capital stock of the Association entitled to vote for the election of directors. Nominations, other than those made by or on behalf of the existing management of this Association, shall be made in writing and shall be delivered or mailed to the President of the Association not less than fourteen (14) days nor more than fifty (50) days prior to any meeting of stockholders called for the election of directors; provided, however, that if less than twenty-one (21) days' notice of the meeting is given to shareholders, such nomination shall be mailed or delivered to the President of this Association not later than the close of business on the seventh (7th) day following the day on which the notice of meeting was mailed. Such notifi-

EXHIBIT A

cation shall contain the following information to the extent known to the notifying shareholder: (a) the name and address of each proposed nominee; (b) the principal occupation of each proposed nominee; (c) the total number of shares of capital stock of the Association that will be voted for each purposed nominee; (d) the name and residence address of the notifying shareholder; (e) a statement setting forth with respect to such nominee whether (i) such nominee, any partnership in which such nominee is a general partner or a corporation or association in which such nominee owns or controls 25% or more of the common stock or voting power has defaulted on the payment of principal or interest on any extension of credit made by the Association to such nominee, partnership, or corporation or association or defaulted on any guarantee made by such nominee, partnership or corporation or association with respect to extensions of credit made by the Association and such default was not cured within thirty 30 days, or defaulted on any other obligation of such nominee, partnership or corporation or association to the Association; (ii) such nominee, any partnership in which such nominee is a general partner or any corporation or association in which such nominee owns or controls 25% or more of the common stock or voting power has defaulted on the payment of principal or interest on any extension of credit made by any other financial institution to such nominee, partnership, or corporation or association or defaulted on any guarantee made by such nominee with respect

to extensions of credit made by such other financial institutions and such default was not cured within thirty (30) days; and (f) the number of shares of capital stock of the Association owned by the notifying shareholder. Nominations not made in accordance herewith may, in his discretion, be disregarded by the Chairperson of the Meeting, and upon his instructions, the vote tellers may disregard all votes cast for such nominee."

BE IT FURTHER RESOLVED, that Article II of the Bylaws of the Bank be, and it hereby is, amended to include a new Section 2.8 to read as follows:

"Sections 2.8. Qualifications of Directors.

(a) In addition to qualifications prescribed by the National Bank Act for a person to be eligible to serve on the Board of Directors of the Association, no person shall be eligible to serve as a director of the Association or eligible to be a nominee to become a director of the Association for a one year period after the occurrence of any of the following:

(i) such person, any partnership in which such person is a general partner or any corporation or association in which such person owns of controls 25% or more of the common stock or voting power defaults or as of February 18, 1987 is in default on the payment of principal or interest on any extension of credit made by the Association to such person, partnership or corporation or association or defaults or as of February 18, 1987 is in default on any guarantee made by such person, partnership, or corporation or associa-

tion with respect to extensions of credit made by the Association and such default is not cured within thirty (30) days, or defaults on any other obligation of such person, partnership or corporation or association to the Association, or

(ii) such person, any partnership in which such person is a general partner or any corporation or association in which such person owns or controls 25% or more of the common stock or voting power defaults or as of February 18, 1987 is in default on the payment of principal or interest on any extension of credit made by any other financial institution to such person; partnership or corporation or association or defaults or as of February 18, 1987, is in default on any guarantees made by such person, partnership or corporation or association with respect to extensions of credit made by any other financial institution and such default is not cured within thirty (30) days.

(b) Any director who has any of the events described in Section 2.8(a) above occur to him during his term as a director shall be disqualified to continue to serve as a director of the Association and such person shall be deemed to have vacated his place on the Board of Directors of the Association as of the date any such event described in Section 2.8(a) above occurs. However, any director who has been disqualified pursuant to this section may be considered for appointment as a director at a future date which is at lest one year after the

occurrence of any event described in Section 2.8(a).

(c) Nominations received at any meeting of shareholders for a person to become a director of the Association, who has had any of the events described in Section 2.8(a) above occur to such person within a one year period prior to the date of such nomination shall be disregarded by the Chairperson of such meeting of shareholders; and upon his instructions, the vote tellers shall disregard all votes cast for such nominee."

I certify that the foregoing is true and correct to the best of my knowledge.

WITNESS MY HAND AND SEAL of said Association this _____ day of _____, 1987.

_____

J. Richard Swartz, Executive
Vice President and Cashier

(Seal)

SECRETARY'S CERTIFICATE

I, the undersigned, do hereby certify:

1. That I am the duly elected and acting Executive Vice President and Cashier of Riverside National Bank ("Bank"), a national banking association; and

2. That the following is a true and correct copy of a resolution of the Bank adopted with a quorum present at a regular meeting of the Board of Directors held on the _____ day of _____, 1987.

> BE IT HEREBY RESOLVED, that ARTICLE I, Section 1.3 of the Bylaws of the Bank be, and it hereby is, amended to read as follows:
>
> "Section 1.3. Nominations for Director. Nominations for election to the Board of Directors may be made by the Board of Directors or by any stockholders of any outstanding class of capital stock of the Association entitled to vote for the election of directors. Nominations, other than those made by or on behalf of the existing management of this Association, shall be made in writing and shall be delivered or mailed to the President of the Association not less than fourteen (14) days not more than fifty (50) days prior to any meeting of stockholders called for the election of directors; provided, however, that if less than twenty-one days' notice of the meeting is given to shareholders, such nomination shall be mailed or delivered to the President of this Association not later than the close of business on the seventh (7th) day following the day on which the notice of meeting was mailed. Such

EXHIBIT B

notification shall contain the following information to the extent known to the notifying shareholder: (a) the name and address of each proposed nominee; (b) the principal occupation of each proposed nominee; (c) a statement setting forth with respect to such nominee whether (i) such nominee, any partnership in which such nominee is a general partner or a corporation of association in which such nominee owns or controls 25% or more of the common stock or voting power has defaulted on the payment of principal or interest on any extension of credit made by the Association to such nominee,partnership, or corporation or association and such default was not cured within thirty (30) days or has defaulted on any guarantee made by such nominee, partnership or corporation or association with respect to extensions of credit made by the Association and such default has not cured within thirty (30) days, or has defaulted on any other obligation of such nominee,partnership or corporation or association to the Association and such default was not cured within thirty (30) days; (ii) such nominee, any partnership in which such nominee is a general partner or any corporation or association in which such nominee owns or controls 25% or more of the common stock or voting power has defaulted on the payment of principal or interest on any extension of credit made by another other financial institution to such nominee,partnership, or corporation or association and such default was not cured within thirty (30) days or has defaulted on any guarantee

made by such nominee, partnership, or corporation or association with respect to extensions of credit made by such other financial institution and such default was not cured within thirty (30) days; (iii) and with respect to any default specified in subparagraphs (c)(i) or (c)(ii)above information concerning the date and nature of the default, the financial institution at which such default occurred and when such default was cured; (d) the name and residence address of the notifying shareholder; and (e) the number of shares of capital stock of the Association owned by the notifying shareholder. Nominations not made in accordance herewith may, in his discretion, be disregarded by the Chairperson of the Meeting, and upon his instructions, the vote tellers may disregard all votes cast for such nominee."

BE IT FURTHER RESOLVED, that Article II of the Bylaws of the Bank be, and it hereby is, amended to include a new Section 2.8 to read as follows:

"Section 2.8 Qualification of Directors.

(a) In addition to qualifications prescribed by the National Bank Act for a person to be eligible to serve on the Board of Directors of the Association, no person shall be eligible to serve as a director of the Association or eligible to be a nominee to become a director of the Association for the period specified in Section 2.8(b) below after the occurrence of any of the following:

(i) such person, any partnership in which such person is a general partner or any

corporation or association in which such person owns or controls 25% or more of the common stock or voting power (v) defaults on the payment of principal or interest on any extension of credit made by the Association to such person, partnership or corporation or association and such default is not cured within thirty (30) days; or (w) defaults on any guarantee made by such person, partnership, or corporation or association with respect to extensions of credit made by the Association and such default is not cured within thirty (30) days, or (x) on or after February _____, 1987 is in default on the payment of principal or interest on any extension of credit made by the Association to such person, partnership or corporation or association and such default has existed for thirty (30) says or more, or (y) on or after February _____, 1987 is in default on any guarantee made by such person, partnership, or corporation or association with respect to extensions of credit made by the Association and such default has existed for thirty (30) days or more, or (z) defaults on any other obligation of such person, partnership or corporation or association to the Association and such default is not cured within thirty (30) days; or

(ii) such person, any partnership in which such person is a general partner or any corporation or association in which such person owns or controls 25% or more of the common stock or voting power (w) defaults on the payment of principal or interest on any extension of credit made by any other financial

institution to such person, partnership or corporation or association and such default is not cured within thirty (30) days; or (x) defaults on any guarantee made by such person, partnership or corporation of association with respect to extensions of credit made by any other financial institution and such default is not cured within thirty (30) days or (y) on or after February _____, 1987 is in default on the payment of principal or interest on any extension of credit made by any other financial institution to such person, partnership, or corporation or association and such default has existed for thirty (30) days or more; or (z) on or after February _____, 1987 is in default on any guarantee made by such person, partnership, or corporation or association with respect to extensions of credit made by another financial institution and such default has existed for thirty (30) days or more.

(b) Amy person who has any of the events described in Section 2.8(a) occur with respect to him shall be ineligible to serve as a director of the Association until one year after the default which occurred with respect to such person has been cured.

(c) Any director who has any of the events described in Section 2.8(a) above occur with respect to him during his term as a director shall be disqualified to continue to serve as a director of the Association and such person shall be deemed to have vacated his place on the Board of Directors of the Association as of the date any such event described in Section

2.8(a) above occurs. However, any director who has been disqualified pursuant to this section may be considered for appointment as a director at a future date which is at least one year after the default which gave rise to such disqualification has been cured.

(d) Nominations made at or received for any meeting of shareholders for a person to become a director of the Association, who has had any of the events described in Section 2.8(a) above occur to such person and such default has not been or will not have been cured for at least a one year period prior to the date of the meeting of shareholders to elect directors shall be disregarded by the Chairperson of such meeting of shareholders; and upon his instructions, the vote tellers shall disregard all votes cast for such nominee."

I certify that the foregoing is true and correct to the best of my knowledge.

WITNESS MY HAND AND SEAL of said Association this _____ day of _____, 1987.

_____

J. Richard Swartz, Executive
Vice President and Cashier

(SEAL)

H-31

CERTIFIED
RETURN RECEIPT REQUESTED

February 26, 1987

Mr. Nicholas E. Tavaglione
9000 Arlington Avenue
Riverside, California 92503

Dear Nick:

On February 26, 1987, the Board of Directors held a meting at which they adopted a new Bylaw which prescribes certain requirements for a person to be eligible to serve on the Board of Directors of the Bank. The new Bylaw provides that if a person or certain of his affiliated entities default on extensions of credit from the Bank or another financial institution and such default is not cured within 30 days or such person or his affiliated entities was in default on extensions of credit from the Bank or another financial institution as of February 26, 1987 and such default has existed for 30 days or more, such person would be ineligible to serve as a director of the Bank. The inability to serve as a director would last for a period of one year after the default was cured.

RIVERSIDE
NATIONAL
BANK RNB

As you know, you unfortunately do not meet the qualifications as set forth in the Bylaws for serving as a director of the Bank. Therefore, this is to confirm that, pursuant to the Bylaws of the Bank, you are disqualified to continue to serve as a

EXHIBIT C

director of the Bank and you are deemed to have vacated your place on the Board of Directors as of February 26, 1987.

On behalf of the Board of Directors, I want to thank you for your contributions and commitment to the Bank and express our sincere hope that you will continue to enthusiastically support the Bank. We look forward to you returning as a member of the Board of Directors as soon as possible.

Very truly yours,

Dolores M. Magnuson

Dolores M.Magnuson
Chairman of the Board

dp

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE		FOR COURT USE ONLY
TITLE OF CASE (abbreviated) NICHOLAS E. TAVAGLIONE v. MICHAEL C. BILLINGS, ET AL.		
ATTORNEY(S) NAME AND ADDRESS MILLER, BOYKO AND BELL 550 West "B" street, Suite 400 San Diego, CA 92101-3599	TELEHPONE (619) 235-4040	
ATTORNEY(S) FOR: Plaintiff	HEARING DATE-TIME-DEPT	CASE NUMBER 187341

DECLARATION OF SERVICE BY MAIL

I, DEBORAH L. TRELOAR declare: That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed (Residing/Employed) in the County of San Diego, California, within which county the subject mailing occurred.

My Business (Residence/Business) address is 550 West "B" Street, Suite 400, (No., Street) San Diego, CA 92101-3559 (City, State). I served the following document(s)

FIRST AMENDED COMPLAINT FOR ILLEGAL OUSTER OF PLAINTIFF AS A DIRECTOR; INVASION OF PRIVACY; BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING; DEFAMATION; AND INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS

(set forth exact title of document(s))

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

STEVEN M. GOLDBERG, ESQ.
MICHAEL A. FIRESTEIN, ESQ.
ANTHONY J. TOLBERT, ESQ.
MANATT, PHELPS, ROTHENBERG & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, CA 90064

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego California, on July 22 19 87.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on JULY 22, 19 87.

Deborah L. Treloar
(Signature)

PROOF OF SERVICE BY MAIL

APPENDIX I

MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
MICHAEL A. FIRESTEIN
ANTHONY J. TOLBERT
11355 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (213) 312-4000

FILED
RIVERSIDE COUNTY
AUG 25 1987
WILLIAM E. CONERLY, Clerk
by K. Morgan Deputy

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 DEMURRER BY DEFENDANTS TO PLAINTIFF'S FIRST COMPLAINT DATE: September 29, 1987 TIME: 8:30 A.M. DEPT: 11

Defendants Michael C. Billings, Dolores Magnuson, Maryann Archambault, Leon Sigerman, J. Richard Swartz, Roy E. Whitehead (the "individual defendants") and Riverside National Bank (the "Bank") hereby demur to the first amended complaint filed by plaintiff Nicholas E. Tavaglione (hereinafter "Tavaglione") on each of the following grounds:

DEMURRER TO THE FIRST CAUSE OF ACTION

1. The First Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

DEMURRER TO THE SECOND CAUSE OF ACTION

2. The Second Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

DEMURRER TO THE THIRD CAUSE OF ACTION

3. The Third Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

DEMURRER TO THE FOURTH CAUSE OF ACTION

4. The Fourth Cause of Action fails to state facts sufficient to constitute a cause of action against any of the defendants because it fails to allege any statutory or contractual basis for a good faith duty owing from defendants to Tavaglione.

5. The Fourth Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

6. The Fourth Cause of Action is uncertain because it fails to clearly set forth the acts of defendants providing the basis of the purported cause of action.

DEMURRER TO THE FIFTH CAUSE OF ACTION

7. The Fifth Cause of Action fails to state facts sufficient to constitute a cause of action against any of the defendants because a party cannot interfere with its own contractual relationship.

8. The Fifth Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

9. The Fifth Cause of Action is uncertain because it fails to specify the nature of and the parties to the contractual relationships allegedly interfered with by defendants.

DEMURRER TO THE SIXTH CAUSE OF ACTION

10. The Sixth Cause of Action fails to state facts sufficient to constitute a cause of action against any of the defendants because it fails to allege that but for defendants' allegedly tortious interference, Tavaglione would have realized any economic advantage.

11. The Sixth Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

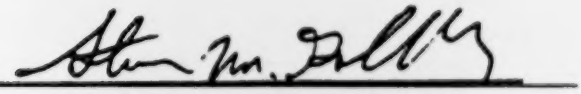
DEMURRER TO THE SEVENTH CAUSE OF ACTION

12. The Seventh Cause of Action fails to state facts sufficient to constitute a cause of action against any of the defendants because it fails to allege the existence of any duty owed by defendants to Tavaglione with respect to any contractual relationship.

13. The Seventh Cause of Action fails to state facts sufficient to constitute a cause of action against the individual defendants who acted in their capacities as agents of the Bank.

DATED: August 25, 1987.

MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
MICHAEL A. FIRESTEIN
ANTHONY J. TOLBERT

By 

STEVEN M. GOLDBERG
Attorneys for Defendants

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11355 West Olympic Boulevard, Los Angeles, California, 90064.

On August 25, 1987, I served the foregoing document described as DEMURRER BY DEFENDANTS TO PLAINTIFF'S FIRST AMENDED COMPLAINT on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

ROY MORROW BELL, ESQ.;
FLETCHER W. PADDISON, ESQ.
MILLER, BOYKO AND BELL
550 West "B" Street, Suite 400
San Diego, CA. 92101-3599

/X/ **(BY MAIL)** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on August 25, 1987, at Los Angeles, California.

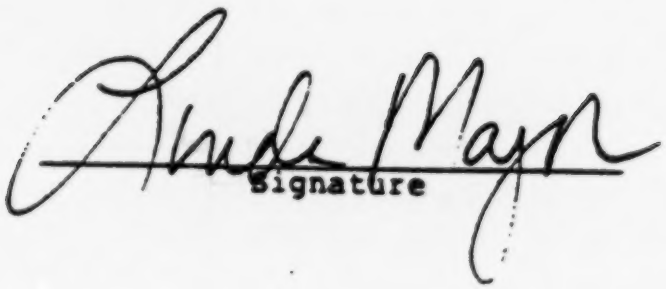
/ / **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on August 25, 1987, at Los Angeles, California.

/X/ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/ / **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

LINDA MAJOR
(Type or Print Name)



MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
MICHAEL A. FIRESTEIN
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11355 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (213) 312-4000

FILED
RIVERSIDE COUNTY
AUG 25 1987
WILLIAM E. CONERLY, Clerk
by K. Morgan Deputy

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

I.

INTRODUCTORY STATEMENT

On July 9, 1987, this Court sustained in substantial part defendants' demurrer to plaintiff Nicholas E. Tavaglione's ("Tavaglione") original complaint. Tavaglione has filed an amended complaint. Unfortunately, Tavaglione's amended complaint has not cured many of the defects found in his original complaint.

This demurrer to the amended complaint is submitted on behalf of defendants Michael C. Billings, Dolores Magnuson, Maryann Archambault, Leon Sigerman, J. Richard Schwartz, Roy E. Whitehead (the "individual defendants") and Riverside National Bank (the "Bank"). Tavaglione filed this action after the Bank, by its board of directors, passed a bylaw (hereinafter the "bylaw") to regulate the internal affairs of the Bank with respect to the qualifications of board directors.

Once again, Tavaglione has failed to allege facts sufficient to constitute a cause of action against the Bank in connection with his fourth, fifth, sixth and seventh causes of action. Moreover, because the amended complaint admits that the individual defendants acted at all times within the course and scope of their agency on behalf of the Bank, Tavaglione has failed to allege facts sufficient to state a cause of action against the individual defendants with respect to any of his causes of action.

II.

FACTS

For purposes of this demurrer, all of Tavaglione's allegations are assumed to be true. Those allegations are summarized below.

In or about April, 1986, at the Bank's annual shareholders' meeting, Tavaglione was elected as a member of the board of directors of the Bank. See Complaint at ¶18. As of February 3, 1987, Tavaglione had loans from the Bank which had been in default for periods in excess of thirty (30) days. Id. at ¶11. On or about February 3, 1987, Tavaglione was advised that the board of directors was considering adopting a bylaw which would regulate the appointment and qualification of board directors. Id. at ¶19. On or about February 26, 1987, Tavaglione was informed by the board that, pursuant to the adopted bylaw, Tavaglione had been disqualified to serve as a director of the Bank and was consequently deemed to have vacated his place on the board. Id. at ¶17 and Exhibit "C" incorporated therein by reference.

Tavaglione became furious and this lawsuit ensued.

III.

ARGUMENT

A. Tavaglione's Fourth Cause Of Action For Breach Of The Implied Covenant Of Good Faith And Fair Dealing Fails To State A Cause Of Action And Is Uncertain.

Defendants successfully demurred to the fourth cause of action in Tavaglione's original complaint. Tavaglione has not cured the defects in that cause of action in his amended complaint.

Initially, it is impossible to determine the source of the duty of good faith alleged by Tavaglione to be owed to him. No contract is alleged, nor is any statutory basis for a good faith duty set forth by Tavaglione. At the very least, more explicit averments supporting this purported cause of action should be required. Whatever Tavaglione's theory may be, his amended complaint fails to allege sufficient facts to state a cause of action. If Tavaglione is seeking contract remedies for the bad faith breach of a contract, his attempt must fail as a matter of law, because, as noted above, no contract is alleged or described. Additionally, no breach of a contract is alleged.

Tavaglione's allegations in support of this purported cause of action can be reduced to the following conclusory statement: "Defendants, and each of them, held a duty to plaintiff to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank. . . and to preserve and protect plaintiff's rights as a shareholder." See Complaint at ¶53. In asserting the existence of this "duty" on the part of defendants, Tavaglione has failed to allege any facts to support his allegation. Significantly, in light of Tavaglione's admission that he was the "largest shareholder of the Bank" [Complaint at ¶51], the elements of public interest,

adhesion and unequal bargaining power necessary to create the "special relationship" required to maintain a cause of action for breach of the implied covenant of good faith and fair dealing are absent. See, e.g., Seaman's Direct Buying Service, Inc. v. Standard Oil Co. of California, Inc., 36 Cal.3d 752, 206 Cal.Rptr. 354 (1984); Commercial Cotton Co. v. United California Bank, 163 Cal.App.3d 511, 209 Cal.Rptr. 551 (4th Dist. 1985).

It is therefore clear that Tavaglione's fourth cause of action is once again subject to demurrer on the grounds that it fails to allege sufficient facts to state a cause of action. Additionally, it is not certain from the complaint whether Tavaglione's fourth cause of action is based upon the adoption of the bylaw, or upon some other grounds. Finally, it is impossible to ascertain whether Tavaglione is setting forth this cause of action in his capacity as a shareholder or as a loan customer of the Bank. Accordingly, defendants cannot reasonably respond to Tavaglione's uncertain allegations in this fourth cause of action.

Based on the foregoing reasons, defendants' demurrer to the fourth cause of action for breach of the implied covenant of good faith and fair dealing should be sustained.

B. Tavaglione's Fifth Cause Of Action For Interference With Contractual Relationships Fails To State A Cause Of Action And Is Uncertain.

Tavaglione also has failed to cure his fifth cause of action for interference with contractual relationships. To state a cause of action for tortious interference with contract, the complaint must allege the existence of a valid contract, that the defendant had knowledge of the contract and intended to induce its breach, that the contract was in fact breached, that the breach was caused by the defendant's wrongful acts, and that there has been injury to the plaintiff. Dryden v. Tri-Valley Growers, 65 Cal.App.3d 990, 135 Cal.Rptr. 720 (1st Dist. 1977). Tavaglione has neglected to include virtually all of the allegations essential to maintaining this cause of action.

Moreover, the complaint is entirely uncertain as to the contracting parties purportedly forming the alleged contractual relationships. Tavaglione alleges that Riverside "intended to interfere with plaintiff's ongoing business and economic relationship with the Bank, as a shareholder, a director, and a loan customer." See Complaint at ¶65. However, it is clear as a matter of law that an action for interference with contractual relationships does not lie against another party to the contract, but can only arise upon the wrongful acts of a third party. Id., 65 Cal.App.3d at 999; Kelly v. General Telephone Co., 136 Cal.App.3d 278, 288, 186 Cal.Rptr. 184, 188 (2d Dist. 1982).

Consequently, the fifth cause of action fails to state sufficient facts to constitute a cause of action and is uncertain as to the nature of and parties to any purported contractual relationships. As a result, this Court should once again sustain the demurrer to Tavaglione's fifth cause of action.

C. Tavaglione's Sixth Cause Of Action For Interference With Contractual Relations Fails To State A Cause of Action.

In much the same manner as with the fifth cause of action, Tavaglione has failed to allege essential facts in support of his sixth cause of action for interference with contractual relations and prospective advantage. Initially, it should be pointed out that Tavaglione has attempted to combine two separate and distinct causes of action (interference with contractual relations and interference with prospective economic advantage) into one cause of action. With respect to the tort of interference with prospective advantage, the following elements must be stated: (1) An economic relationship between plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) knowledge on the part of the defendant of this relationship; (3) acts by the defendant intended to disrupt the relationship; (4) actual disruption of the relationship; and (5) resulting damages to the plaintiff. Buckaloo v. Johnson, 14 Cal.3d 815, 122 Cal.Rptr. 745 (1975); Asia Investment Co. v. Borowski, 133 Cal.App.3d 832, 184 Cal.Rptr. 317 (3d Dist. 1982).

Tavaglione's sixth cause of action in his Complaint is deficient in that it fails to meet the first element stated above. Specifically, Tavaglione has failed to allege that but for the defendants' allegedly tortious conduct, Tavaglione would have consummated the "deal" with any third party and realized an economic advantage. In Wilson v. Loew's Inc., 142 Cal.App.2d 183, 298 P.2d 152 (2d Dist. 1956), the court stated:

> . . . it is essential to a cause of action for unlawful interference with business interest that it appear that, except for the interference of the defendant, there was a reasonable prob-

> ability that plaintiff would have entered into a contract or made a profit. (Emphasis added.)

Id. at 192. See also, Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal.2d 305, 70 Cal.Rptr. 849 (1968). Once again, this Court should sustain the demurrer to Tavaglione's sixth cause of action.

D. Tavaglione's Seventh Cause of Action For Negligent Interference With Contractual Relationships Fails To State A Cause of Action.

Although an action can be maintained for negligent interference with contractual relationships, an essential allegation of that cause of action is that there existed a duty of care owed by the defendant to the plaintiff with respect to the purported contractual relationships. Chameleon Engineering Corp. v. Air Dynamics, Inc., 101 Cal.App.3d 418, 161 Cal.Rptr. 463 (5th Dist. 1980); cf. J'Aire Corporation v. Gregory, 24 Cal.3d 799, 157 Cal.Rptr. 407 (1979).

In determining whether a defendant owes a plaintiff a duty with respect to a particular contractual relationship, the court in Chameleon set forth the following criteria: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injuries suffered by the plaintiff; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm.

Tavaglione's amended complaint has failed to allege virtually all of these required elements. Accordingly, Tavaglione's seventh cause of action is also subject to demurrer for failure to allege facts sufficient to constitute a cause of action.

E. Tavaglione's Amended Complaint Fails To State Causes Of Action Against The Individual Defendants Who Acted In Their Capacities As Agents Of The Bank.

In his amended complaint, Tavaglione admits that "defendants, and each of them, were the agents, employees and servants of each other, and that at all times relevant hereto, said defendants were acting within the course, scope and purpose of such agency, service and employment." See Complaint at ¶5.

It is a well-settled rule of law that an agent of a corporation is immune from liability unless there are facts alleged from which it is shown that the individual agent was acting in a capacity other than as an agent of the corporation. See Wise v. Southern Pacific Co., 223 Cal.App.2d 50, 35 Cal.Rptr. 652 (1st Dist. 1963): Martin v. Jacuzzi, 224 Cal.App.2d 549, 36 Cal.Rptr. 880 (1st Dist. 1964). As the court in Wise stated:

> Agents and employees of a corporation cannot conspire with their corporate principal or employer when they act in their official capacities on behalf of the corporation and not as individuals for their individual advances [citations omitted]. This rule derives from the principle that obviously corporate agents and employees acting for and on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this respect is privileged.

Id. at 72-73.

Moreover, in instances where a complaint alleges that individual defendants were the agents and employees of a defendant employer and were acting within the course or scope of their employment in committing the acts alleged, California courts have adopted a "managerial privilege" to shield the individual employees/agents from liability as defendants with respect to certain causes of action. See Scopas v. Armstrong World Industries, 114 LRRM 2933 (C.D. Cal. 1983) appeal docketed, No. 84-5706 (9th Cir. 1984); Becket v. Welton Becket & Associates, 39 Cal.App.3d 815, 114 Cal.Rptr. 531 (2d Dist. 1974). Specifically, the managerial privilege protects employers' agents, acting within the scope of their agency, from liability for causes of action rooted in contract, such as interference with contractual relations, interference with prospective business advantage and breach of the implied covenant of good faith and fair dealing. As discussed above, Tavaglione's amended complaint admits that the individual defendants were agents of the Bank and, at all material times were acting within the course and scope of their agency. See Complaint at ¶5.

In Scopas, supra, a wrongful termination action was filed against the employer as well as the employee's supervisory manager. In determining that the manager had been "fraudulently joined" as a party to create diversity jurisdiction, the court concluded that plaintiff could not possibly establish any liability against the defendant/manager. Specifically, the court rejected plaintiff's argument that the manager, as the agent of the employer, committed the tort of wrongful interference with contractual relations by inducing the breach of plaintiff's employment contract. In outlining the contours of the managerial privilege, the court stated:

> [A]gents of employers, acting in the scope of their authority, are shielded from liability by the privilege of "managerial immunity." [cita-

> tions omitted] The Court finds no question of fact regarding Underwood's [defendant/manager] agency status. Indeed, plaintiff's papers repeatedly emphasize that Underwood, as "Supervisory Manager in the L.A. area," acted within the scope of his authority as Armstrong's [defendant/ employer] agent in terminating plaintiff. The Court concludes that the "managerial immunity" of Underwood precludes any recovery by plaintiff against him.

Id. at 2934-2935.

As alleged by Tavaglione, the individual defendants of the Bank's board of directors in the instant action are agents of the Bank, much in the same manner that the defendant manager was an agent of the employer in Scopas. As such, all of the causes of action set forth by Tavaglione in his amended complaint are subject to demurrer pursuant to the managerial privilege. Accordingly, the amended complaint must be dismissed, at least with respect to the individual defendants.

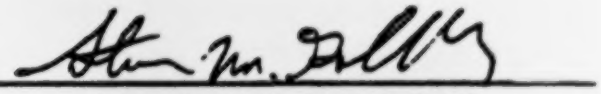
IV.

CONCLUSION

Tavaglione's amended complaint has failed to cure many of the defects found by this Court in the original complaint. Specifically, the fourth, fifth, sixth and seventh causes of action set forth in Tavaglione's Complaint fail to allege sufficient facts to constitute causes of action against the Bank. Moreover, the amended complaint fails to allege facts sufficient to state any cause of action against the individual defendants because Tavaglione admits that the individual defendants were acting at all times as agents for the Bank. Accordingly, defendants respectfully submit that their demurrer should be sustained.

DATED: August 25, 1987.

MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
MICHAEL A. FIRESTEIN
ANTHONY J. TOLBERT

By 
STEVEN M. GOLDBERG
Attorneys for Defendants

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11355 West Olympic Boulevard, Los Angeles, California, 90064.

On August 25, 1987, I served the foregoing document described as MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

ROY MORROW BELL, ESQ.;
FLETCHER W. PADDISON, ESQ.
MILLER, BOYKO AND BELL
550 West "B" Street, Suite 400
San Diego, CA. 92101-3599

/X/ **(BY MAIL)** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on August 25, 1987, at Los Angeles, California.

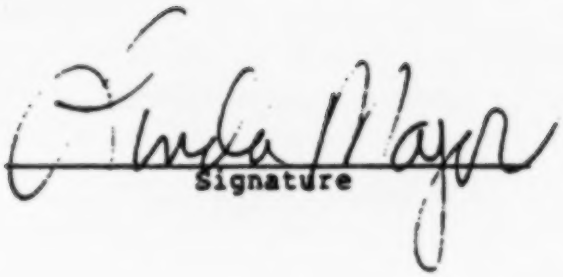
/ / **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on August 25, 1987, at Los Angeles, California.

/X/ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/ / **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

LINDA MAJOR
(Type or Print Name)



APPENDIX J

MILLER, BOYKO and BELL
A Professional Corporation
550 West "B" Street, Suite 400
SAN DIEGO, CALIFORNIA 92101-3599
(619) 235-4040

Attorneys for Plaintiff

FILED
RIVERSIDE COUNTY
NOV 20 1987
WILLIAM E. CONERLY, Clerk
By J. Pascual, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

NICHOLAS E. E.TAVAGLIONE,	CASE NO. 187341
Plaintiff,	NOTICE OF RULING
vs.	
MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive,	
Defendants.	

TO: DEFENDANTS, AND TO THEIR ATTORNEYS OF RECORD, MANATT, PHELPS, ROTHENBERG & TUNNEY:

PLEASE TAKE NOTICE that the demurrers of the defendants came on regularly for hearing on November 13, 1987. No appearances by counsel were made, with the matter having been submitted upon the tentative ruling of the Court. Pursuant to this, Court overruled the demurrers by the defendants, giving the defendants 20 days in which to answer the complaint.

DATE: November 16, 1987

MILLER, BOYKO AND BELL

By _____
FLETCHER W. PADDISON
Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE		FOR COURT USE ONLY
TITLE OF CASE (abbreviated) NICHOLAS E. TAVAGLIONE v. MICHAEL C. BILLINGS, ET AL.		
ATTORNEY(S) NAME AND ADDRESS MILLER, BOYKO AND BELL 550 West "B" street, Suite 400 San Diego, CA 92101-3599	TELEHPONE (619) 235-4040	
ATTORNEY(S) FOR: Plaintiff	HEARING DATE-TIME-DEPT	CASE NUMBER 187341

DECLARATION OF SERVICE BY MAIL

I, DEBORAH L. TRELOAR declare: That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed (Residing/Employed) in the County of San Diego, California, within which county the subject mailing occurred.

My San Diego address is 550 West "B" Street, Suite 400, San Diego, CA 92101-3559. I served the following document(s)

NOTICE OF RULING

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

STEVEN M. GOLDBERG, ESQ.
MICHAEL A. FIRESTEIN, ESQ.
ANTHONY J. TOLBERT, ESQ.
MANATT, PHELPS, ROTHENBERG & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, CA 90064

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego California, on November 16 19 87.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 16, 19 87.

Deborah L. Treloar
(Signature)

PROOF OF SERVICE BY MAIL

APPENDIX K

MANATT, PHELPS, ROTHENBERG & PHILLIPS
STEVEN M. GOLDBERG
JEFF E. SCOTT
11355 West Olympic Boulevard
Los Angeles, California 90064
(213) 312-4000

Attorneys for Defendants

FILED
RIVERSIDE COUNTY
DEC 14 1987
WILLIAM E. CONERLY, Clerk
By K. La Pier Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 ANSWER OF DEFENDANTS TO UNVERIFIED COMPLAINT

In answer to the unverified complaint (the "Complaint") of plaintiff Nicholas E. Tavaglione ("Tavaglione"), defendants Michael C. Billings ("Billings"), Maryann Archambault ("Archambault"), Leon Sigerman ("Sigerman"), J. Richard Swartz ("Swartz"), Roy E. Whitehead ("Whitehead") and Riverside National Bank ("Riverside") (collectively referred to as "defendants") deny, generally and specifically, each and every allegation of the Complaint pursuant to 431.30(d) of the California Code of Civil Procedure.

FIRST AFFIRMATIVE DEFENSE

The Complaint, and each of the alleged causes of action therein, fails to state facts sufficient to constitute a valid cause of action against defendants.

SECOND AFFIRMATIVE DEFENSE

The Complaint, and each of the alleged causes of action therein, fails to state facts sufficient to entitle plaintiff to exemplary and punitive damages.

THIRD AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint by reason of the doctrine of estoppel.

FOURTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint by reason of the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

Tavaglione has failed to mitigate damages, if in fact any damages have been sustained, and any recovery by Tavaglione should be diminished or barred by reason thereof.

SIXTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint pursuant to the "at-will" employment policy of the National Bank Act, 12 U.S.C. § 1, et seq.

SEVENTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint because a national banking institution, such as Riverside, has an inherent right to adopt reasonable bylaws regulating its internal affairs and may properly establish qualifications for the members of its board of directors.

EIGHTH AFFIRMATIVE DEFENSE

Tavaglione may not obtain relief under the Complaint based on the alleged disclosure or publication of information respecting Tavaglione's loans which were in default, Tavaglione's ouster from the board of directors of Riverside, or any other facts, to the extent that Tavaglione, and not defendants, published or caused to be published, the above-described information.

NINTH AFFIRMATIVE DEFENSE

Tavaglione may not obtain relief under the Complaint based on the alleged disclosure or publication of information respecting Tavaglione's loans which were in default, or Tavaglione's ouster from the board of directors of Riverside because such alleged disclosure or publication is privileged pursuant to Civil Code § 47(3).

TENTH AFFIRMATIVE DEFENSE

Tavaglione may not obtain relief under the Second Cause of Action alleged in the Complaint because the statements that defendants allegedly published or caused to be published were true.

ELEVENTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint against the individual defendants, i.e., Billings, Magnuson, Archambault, Sigerman, Swartz and Whitehead, because the individual defendants were the directors, officers and agents of Riverside acting within the course or scope of their agency

and were protected by the managerial privilege in committing the acts alleged.

TWELFTH AFFIRMATIVE DEFENSE

No relief may be obtained under the Complaint based on defendants' publication in a proxy statement to Riverside's shareholders that Tavaglione was a guarantor of a substantial loan and that such loans were in default, because such disclosure is required pursuant to the Securities Exchange Disclosure Rules issued by the Comptroller of the Currency pursuant to Section 12(i) of the Securities Exchange Act of 1934.

WHEREFORE, defendants pray for relief as follows:

1. That Tavaglione take nothing by way of his Complaint;

2. That judgment be entered in favor of defendants;

3. For costs of suit herein; and

4. For such other and further relief as this Court may deem just and proper.

DATED: December 14, 1987

MANATT, PHELPS, ROTHENBERT & PHILLIPS
STEVEN M. GOLDBERT
JEFF E. SCOTT

By _____
JEFF E. SCOTT
Attorneys for Defendants

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11355 West Olympic Boulevard, Los Angeles, California, 90064.

On December 14, 1987, I served the foregoing document described as Answer of Defendants to Unverified Complaint on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Roy Morrow Bell, Esq.
Fletcher W. Paddison, Esq.
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, CA. 92101-3599

/X/ **(BY MAIL)** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

Executed on December 14, 1987, at Los Angeles, California.

/ / **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on December 14, 1987, at Los Angeles, California.

/X/ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/ / **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Teresa A. Pagan
(Type or Print Name)

Signature

APPENDIX L

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX M

§375b. Prohibitions respecting loans and extension of credit to executive officers and directors of banks, political or campaign committees, etc.

. . . .

(3) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person, unless such loan or extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

APPENDIX N

§1818. Termination of status as insured depository institution.

(a) Termination of Insurance

. . .

(2) Involuntary termination

(A) Notice to primary regulator

If the Board of Directors determines that --

(i) an insured depository institution or the directors or trustees of an insured depository institution have engaged or are engaging in unsafe or unsound practices in conducting the business of the depository institution;

(ii) an insured depository institution is in an unsafe or unsound condition to continue operations as an insured institution; or

(iii) an insured depository institution or the directors or trustees of the insured institution have violated any applicable law, regulation, order, condition imposed in writing by the Corporation in connection with the approval of any application or other request by the insured depository institution, or written agreement entered into between the insured depository institution and the Corporation,

the Board of Directors shall notify the appropriate Federal banking agency with respect to such institution (if other than the Corporation) or the State banking supervisor of such institution (if the Corporation is the appropriate Federal

banking agency) of the Board's determination and the facts and circumstances on which such determination is based for the purpose of securing the correction of such practice, condition, or violation. Such notice shall be given to the appropriate Federal banking agency not less than 30 days before the notice required by subparagraph (B), except that this period for notice to the appropriate Federal banking agency may be reduced or eliminated with the agreement of such agency.

(B) Notice of intention to termination insurance

If, after giving the notice required under subparagraph (A) with respect to an insured depository institution, the Board of directors determines that any unsafe or unsound notice or condition or any violation specified in such notice requires the termination of the insured status of the insured depository institution, the Board shall --

(i) serve written notice to the insured depository institution of the Board's intention to terminate the insured status of the institution;

(ii) provide the insured depository institution with a statement of the charges on the basis of which the determination to terminate such institution's insured status was made (or a copy of the notice under subparagraph (A)); and

(iii) notify the insured depository institution of the date (not less than 30 days after notice under this subparagraph) and place for a hearing before the Board of Directors (or any person designated by the Board) with respect to the termination of the institution's insured status.

APPENDIX O

§215.4 General prohibitions.

(a) *Terms and creditworthiness.* No member bank may extend credit to any of its executive officers, directors, or principal shareholders or to any related interest of that person unless the extension of credit:

(1) Is made on substantially the same terms (including interest rates and collateral) as, and following credit underwriting procedures that are not less stringent than, those prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part and who are not employed by the bank; and

(2) Does not involve more than the normal risk of repayment or present other unfavorable features.

. . . .

(c) *Lending limit.* No member bank may extend credit to any of its executive officers, directors, or principal shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all other extensions of credit by the member bank to that person and to all related interests of that person, exceeds the lending limit of the member bank specified in § 215.2(h) of this part. This prohibition does not apply to an extension of credit by a member bank to a company of which the member bank is a subsidiary or to any other subsidiary of that company.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 15, 1994, I served the within *Appendix to Petition For Writ of Certiorari (Volume 2 of 2)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: Original and 40 Copies)

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

Clerk of the Superior Court
for the County of Riverside
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Clerk of the Superior Court
for the County of Riverside
Indio Branch
Honorable H. Morgan Dougherty, Judge
Department C
46-209 Oasis Street
Indio, California 92201

Mr. Roy Morrow Bell
Mr. Fletcher W. Paddison
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599
Attorneys for Plaintiff,
Mr. Nicholas E. Tavaglione

Superior Court Clerk
Riverside County
Post Office Box 431 -- Appeals
Riverside, California 92502

Mr. Raymond Pepper
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1994, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)